IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 395 of 2003
with
CIVIL APPLICATION NO. 7680 OF 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRATIK MEDICINES - THRO' PARTNER PRATIL RAVINDRA BHAGAT

Versus

BOARD OF MANAGEMENT - MEDICAL SUPDT.& DIRECTOR M H MAKWANA

Appearance:

1. Appeal from Order No. 395 of 2003

MR A.H. MEHTA, LD. SR. COUNSEL WITH MR. AMAR N BHATT for petitioner No. 1

MR K.G. VAKHARIA, LD. SR. COUNSEL WITH MR. JITENDRA MALKAN for Respondent No. 1-3,5-6

NOTICE SERVED BY DS for Respondent No. 4,10

MR S.N. SHELAT, LD. ADVOCATE GENERAL WITH MR. MG NAGARKAR for Respondent No. 7-9

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 23 /12 /2003

C.A.V. JUDGEMENT

Pratik Medicine, a partnership firm, appellant herein, original plaintiff, has filed this Appeal under Order 43 Rule 1(r) of the Code of Civil Procedure, against judgement and order below Notice of Motion dated 6.10.2003 passed by the learned City Civil Judge, Court No. 7, Ahmedabad, in Civil Suit No. 1873 of 2003 filed by the plaintiff. The learned judge by his impugned judgement was pleased to reject the Notice of Motion and vacated order of status quo with regard to the possession of the disputed site which was granted on 23.7.2003.

2. The facts giving rise to this appeal are as under:

2.1 The plaintiff is a partnership firm and registered under the provisions of the Partnership Act. The defendant is a trust registered under the provisions of the Bombay Public Trusts Act (hereinafter referred to as "the BPT Act"). There is a property situated in compound of V.S. Hospital, near telephone booth, (area 13.9 x 14.9 sq. ft. = admeasuring 189 sq. ft.), opposite Surgical building of Maternity Hospital, besides Oxygen Cylinder (hereinafter referred to as "the suit premises").

2.2 It is the case of the plaintiff before the trial Court as well as before this Court that the defendant has passed a Resolution No. 212 dated 18.3.2003 and decided to allot suit premises in favour of the plaintiff. It may be noted that three trustees of the trust objected to the same. The terms and conditions of lease has to be worked out by Chairman & Superintendent of Hospital. Pursuant to the said allotment, the agreement of lease was entered into on 8.4.2003 between the plaintiff and the Superintendent of defendant trust in connection with lease of the suit premises for ten years so that the plaintiff can carry on business in view of the same.

2.3 It may be noted that somewhere in July 2003, correspondence ensued between the plaintiff and the defendant. In view of the said correspondence, the plaintiff apprehended that the defendant may dispossess the plaintiff of suit premises and on apprehension the plaintiff filed a suit for injunction of the suit premises on 22.7.2003. The learned judge by his order dated 23.7.2003 came to the conclusion that as the plaintiff is a "permissive user" of the suit property, order of status quo was granted with regard to the

possession of the suit property.

2.4 It may be noted that subsequently the defendant has passed Resolution No. 59 dated 2.8.2003. In the said Resolution it was decided that as the plaintiff has carried out structure on suit premises regarding medical store without building use permission, the said construction is illegal. It was, therefore, decided to revoke the aforesaid agreement entered into between the plaintiff and the defendant and inform the Charity Commissioner according. The authority can initiate the necessary proceedings.

2.4A In view of the same, the plaintiff thereafter amended the plaint and challenged this Resolution before the trial Court as being illegal and bad. The plaintiff also produced necessary evidence below Exh. 4 particularly Resolution dated 18.3.2003, receipt of Rs. 16,500/- and the agreement entered into between the defendant and the plaintiff and other documents.

2.4B The plaintiff has also produced agreement dated 8.4.2003, correspondence ensued between the plaintiff and the Corporation and also the Trust. The plaintiff has also produced an agreement of 26.7.1929 between the Corporation and the Hospital Trust, application filed before the Charity Commissioner, agreement dated 26.7.1929 and another agreement dated 5.12.1929 between the Corporation and Trust, entry in the Register maintained by the Charity Commissioner and other documents, resolution dated 16.7.1970 passed by the Board of Trust and others.

2.4C Defendant Nos. 2,3,5, 7,8,9 filed written statement Exh. 20, 29,43, 52. The plaintiff has also filed rejoinder at Exh. 24.

2.5 The defendants in their reply contended that as defendant is a public trust and defendant has handed over the suit premises on lease to the plaintiff without obtaining permission of Charity Commissioner, the entire transaction is illegal and bad. The Resolution is also passed by majority. It was also true that before the property in question is given on lease, no public advertisement was issued (though it was public premises). It was also contended that the injunction should not be granted in favour of the plaintiff because if the plaintiff ultimately succeeds, he can obtain compensation from the defendants. It was also stated that the Resolution of March 2003 was opposed to public policy and also void as per Section 23 of the Contract Act.

Defendants also produced certain documents.

TRIAL COURT'S FINDINGS:

2.6 The learned trial Judge has heard the matter at length and came to the conclusion that the land originally belonged to the municipality which has been transferred to the trust managed by defendant No. 1 Board of Management and therefore it is belonging to the trust. The learned trial judge held that once the land was found belonging to the Trust, Section 36 of the BPT Act would be attracted and any such alienation of transfer without previous sanction of the Charity Commissioner would be void. The learned judge further held that the plaintiff did not deliberately join the Corporation as party defendant though the contention was raised that the suit is not maintainable for non-joinder of parties. The Corporation would certainly have been a proper party to resolve the dispute with regard to the aspect of Resolution on the aspect whether the property belonged to the Corporation or the Trust. The learned judge further held that granting lease in favour of the plaintiff for opening the medical store is stated to be in public interest to provide facilities to the patients or the relatives blissfully ignoring the fact that it would not have been in the public interest and interest of patients that no such space can be allowed near the Emergency Ward. Further there is already in existence medical store run by Apna Bazar. The learned judge held that comparative hardship by grant of injunction or continuous thereof would be more than by rejecting inasmuch as even if the plaintiff succeeds in the suit ultimately he can be compensated in terms of money inasmuch as the plaintiff has no right to claim space. In view of the same, the learned rejected the Notice of Motion and also vacated ad-interim relief regarding status quo granted earlier.

PLAINTIFF-APPELLANT'S CONTENTIONS:

3. Being aggrieved and dissatisfied with the aforesaid judgement and order of the learned Judge, this appeal is filed. Mr. Arun H. Mehta, learned senior counsel with Mr. Amar N. Bhatt, learned advocate, appears on behalf of the appellant, original plaintiff. His first contention is that the finding of the learned judge that lease has been given contrary to Section 36 of the BPT Act is itself trust property is erroneous in facts and circumstances of the case. He has stated that the land originally belonged to and is the ownership of Ahmedabad Municipal Corporation (hereinafter referred to

as "the Corporation"). For substantiating the aforesaid contention the learned counsel has invited my attention to agreement dated 26.7.1929 entered into by the Corporation with the Executors and Trustees of late Vadilal Sarabahi and Sheth Choonilal Nagindas and others to acquire land for general hospital and maternity hospital and provide for the management and administration thereof. Clause (9) deals with control of the hospital. Clause (28) deals with land site of the hospitals. Clause (28) shows that the ownership of the land and hospitals were to be of the Corporation. Clause (29) deals with reconstruction of hospital building in the event of their being destroyed. These clauses show that the land and the buildings vest and belonged to the Corporation.

3.1 The learned counsel further relies on the agreement between the Corporation and the trust regarding Board of Management, land ownership of the Corporation was entered into on 5.12.1929. Clause (28) of the said agreement provides that the Municipality shall stand possessed of the piece of land. He has further relied on the Resolution dated 16.7.1970 of the Board of Management which showed that the resolution was passed accepting that the land belonged to and was and is of the ownership of the Corporation. He has also invited my attention to Record of Rights in Form No. 7/12 which also showed that the ownership of the land is of the Corporation. He has also invited my attention to the fact that entry in the register maintained by the Charity Commissioner showed that the land is registered as owner in the name of the Corporation. He has submitted that from the record it appears that both the trust and Corporation were treated as one by the Corporation and there is common Board of Management which runs the hospital, accounts and finance. In view of the aforesaid facts and circumstances of the case, he submitted that the ownership of the suit land is of the Corporation. He, therefore, submitted that if the ownership of the land is not of trust but of the Corporation, Section 36 of the BPT Act has no application to the facts of the case. He submitted that Section 36 has no application when the property is not of trust but is only managed by the trust. He submitted that, therefore, reasoning of the learned judge that the lease given by the plaintiff by resolution is contrary to Section 36 of the Contract Act is illegal and bad in law. He submitted that the land prima facie belonged to the ownership of the Corporation. The words "belongs to Corporation" are used in clause 9, 28 and 29 in the agreement between the Corporation and the trusts. The learned counsel submitted that Corporation is not public

Charitable Trust and no provision of BPT Act is applied to it. He submitted that the Board has been constituted to manage the affairs of the hospitals by the agreements between the Corporation and the trust. He submitted that the Board has framed its Rules for its internal management. He submitted that prima facie finding that the agreement is void ab initio as its violates Section 36 of BPT Act is erroneous.

3.2 AS regards BPT Act, he has submitted that the Charity Commissioner has exclusive jurisdiction and for that purpose he has relied on the judgement of this Court in the case of KUBERBHAI SHIVDAS AND ANOTHER VS. MAHANT PURSHOTTAMDAS KALYANDAS AND OTHERS reported in 2 GLR 564 and SHERASIVA SAJI ALVADI MOMIN VS. STATE OF GUJARAT reported in (1985) 1 GLR 513. The Scheme of BPT Act has been discussed. Jurisdiction of the Civil Court to decide questions required to be determined by the Charity Commissioner is barred. BPT Act is self-contained Code.

3.2A The plaintiff has got strong prima facie case. He is likely to loose several lacs of rupees and reputation in business if interim relief is refused. Balance of convenience is in favour of the plaintiff as the defendants are being paid monthly rent of Rs. 16,500/- plus all other out goings. Medicines are required by patients which are supplied by the plaintiff.

3.3 As regards principle of grant of interim relief, the learned counsel has relied on the judgements of the Hon'ble Supreme Court in the cases of MAHENDRA AND MAHENDRA PAPER MILLS LTD. VS. MAHENDRA AND MAHENDRA LTD. reported in AIR 2002 SC 117 particularly paragraph No. 17 and HINDUSTAN PETROLEUM CORPORATION LTD. VS. SRI SRIMAN NARAYAN AND ANOTHER reported in AIR 2002 SC 2598 particularly paragraph Nos. 7, 8 and 9 which deal with grant of interim mandatory relief which requires strong prima facie case unlike only prima facie case where prohibitory relief is asked for. Para 9 of the said judgement on page 2601 the Hon'ble Supreme Court has given the guidelines thus:

"(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall be ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as a pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

3.3A He has also relied on the judgement of this Court in the case of ADANI EXPORTS LTD. VS. HINDUSTAN ORGANIC CHEMICALS LTD. reported in 2000(3) GLR 2759 particularly paragraph nos. 31, 32 and 32.1.

3.4 He further submitted that the plaintiff has obtained possession of the premises by way of Resolution and if the trust desires that the plaintiff may be evicted from the suit premises then they must follow due process of law. There cannot be dispossession by force. In support of the said contention, the learned counsel for the appellant has relied on the judgement of this Court in the case of RAMASHREE MAHAVIR VS. GIRDHARNATH BHOLANATH AGARWAL reported in (1970) 11 GLR 971.

3.5 He has further submitted that this is an appeal against grant or refusal to grant interim relief which is against discretion exercised by the trial Court. He submitted that if the learned trial judge has not properly exercised the discretion then this Court can interfere with the said decision of the trial Court. In support of the same he has relied on the decision of the Hon'ble Supreme Court in the case of PRINTERS (MYSORE) PRIVATE LTD. VS. POTHAN JOSEPH reported in AIR 1960 SC 1156 particularly paragraph Nos. 7, 8 and 9 of the said judgement which are important. He submitted that paragraph 9 of the said judgement lays down that it is the duty of the appellate Court to interfere with the order passed by the trial Court when it finds that the order of the trial Court suffers from the vice mentioned in the said paragraph. Paragraph 9 of the said judgement reads as under:

"Where the discretion vested in the Court under S. 34 has been exercised by the trial court the appellate court should be slow to interfere with the exercise of the said discretion. In dealing

> with the matter raised before it at the appellate stage the appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the appellate court - and in many cases it may be its duty to interfere with the trial court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial court is in law wrongful and improper and that would certainly justify and call for interference from the appellate court."

DEFENDANTS-RESPONDENTS CONTENTIONS:

4. On behalf of respondent Nos. 1, 2 and 3 Mr. K.G. Vakharia, learned sr. counsel with Mr. Jitendra Malkhan, learned advocate appears. The learned counsel for the respondents stated that the plaintiff has put up their case mainly on the ground disputing ownership of trust/ Board of Management from whom the plaintiff had taken the land on lease on the monthly rent of Rs. 16,500/- in the month of April, 2003. The learned counsel has invited my attention to the application for interim injunction filed by the plaintiff. The learned counsel has submitted that in para 2 of the said application the plaintiff has admitted in no uncertain terms that defendant No. 1 trust has allotted the suit premises to the plaintiff on leasehold rights and the plaintiff has been put in possession as tenant with effect from 8.4.2003. Now the plaintiff has disputed the ownership of defendant No. 1 to grant such lease. The learned counsel submitted that it is not open to the plaintiff to dispute ownership of defendant No. 1. In support of the same, he has relied on Section 116 of the Evidence Act and submitted that Section 116 of the Evidence Act puts an embargo of estoppel upon the tenant

to dispute the ownership of the land from whom the plaintiff has taken lease as recently as in the month of April, 2003 according to their own averments in their application for interim injunction as well as plaint. The learned counsel for the respondents has relied on Section 16 of the Indian Evidence Act which provides as under:

"Sec. 116 - Estoppel of tenant and of licensee of person in possession: No tenant of immovable property, or person claiming through such tenant, shall, during the continuous of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property, and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had title to such possession at the time when such licence was given."

4.1 The learned counsel has also relied on the judgement of the Apex Court in the case of TEJ BHAVAN MADAN VS. SECOND ADDITIONAL DISTRICT JUDGE AND OTHERS reported in 1989(1) GLH 229 where Section 116 of the Act has been interpreted by the Hon'ble Supreme Court. The Supreme Court in para 9 of the said judgement observed as under:

"The law as to the estoppel of a tenant under Section 116 of the Eviction Act is a recognition, and statutory assimilation, of the equitable principles underlying estoppel in relation to tenants. The Section is not exhaustive of the law of estoppel. The Section inter alia, predicates that no tenant of immovable property shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, title to such property."

4.1A Similar principles have been laid down by the Hon'ble Supreme Court in the case of S. THANGAPPAN VS. P. PADMAVATHY reported in AIR 1999 SC 3584.

4.1B The learned counsel for the respondents has submitted that the plea that the suit premises in question do not belong to the Board of Management or Trust, but belong to the Corporation is not correct. He submitted that the learned judge has discussed the aforesaid aspect in detail in the later part of paragraph

22 of the judgment. The learned counsel has invited my attention to clause 28(a) and (b) of the agreement between the Municipality and the trust, particularly agreement dated 5.12.1929 which is produced on pages 99-100 of the paper book (which provides the site of the hospital). The learned counsel submitted that clause (28) specifically provides that the Municipality has handed over the possession of the land in question to the trust with a right to use the aforesaid land. It may be noted that there is no dispute between the Board of Management/Trust and the Corporation regarding the trust being in possession and management of the land in question since many years and the right of management includes right to manage the land in any manner whatsoever in view of the ample documentary evidence. The reliance placed by the plaintiff upon the evidence on record regarding the name of the Corporation as owner is irrelevant and not germane to the issue raised. The question is not of the ownership but the question is of the management and the possession of the land and in that sense the land belonged to the trust.

4.1C The learned counsel has invited my attention to Section 36 of the Bombay Public Trusts Act as applicable to the State of Gujarat which provides as under:

"Section 36 - Alienation of immovable property of Public Trust:

(1) Notwithstanding anything contained in the instrument of trust -

(a) no sale, mortgage, exchange or gift of any immovable property, and

(b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land on a building belonging to a public trust

shall be valid without the previous sanction of the Charity Commissioner.

(2) The decision of the Charity Commissioner under sub-section (1) shall be communicated to the trustees and shall be published in such manner as may be prescribed.

(3) Any person aggrieved by such decision may appeal to the Gujarat Revenue Tribunal within

thirty days from the date of its publication.

(4) Such decision shall, subject to the provisions of sub-section (3) be final."

4.2 The learned counsel submitted that before the defendant trust entering into transaction with the plaintiff to lease agreement prior permission under Section 36 of the Act is required to be obtained. The lease of immovable property belonging to a trust is void if the permission of the Charity Commissioner is not obtained. In support of the aforesaid contention, the learned counsel has relied on the Division Bench judgement of this Court in the case of HUSEINMIYA VS. HABIBSHA relied on 1985(2) GLR 928 where similar principles have been evolved where the Court has held that as per Section 36 of the BPT Act, no immovable property of a public trust can be alienated in favour of any one by a trustee without express permission of the Charity Commissioner. According to Section 36 of the BPT Act, as far as alienation of immovable property of Public Trust is concerned, if lease is for a period exceeding three years in the case of non-agricultural land on a building belonging to a public trust, it shall not be valid without previous sanction of the Charity Commissioner. Sub-clauses (2) and (3) provide procedure regarding the Charity Commissioner passing the order. If such alienation is made, it shall be invalid. Admittedly, no such permission was taken in the present case prior to entering into the said agreement. Consequently, the transaction entered into by defendant No. 1 in favour of the plaintiff remained nullified and not binding on the trust.

4.3 The learned counsel further submitted that as per the list Exh. 59 regarding registration of the trust and other documents produced along with it clearly suggest that the land of the Corporation was transferred to the trust and was to be managed as stated above by the Board of Management. Therefore, the land belonged to the Trust and reference to the word "belonged" in the Black Law Dictionary would convey that if substantial rights are transferred, it can be said to be belonging to the trust.

4.4 The learned counsel for the respondent submitted that assuming without admitting that the the plaintiff can plead the case that the land belonged to the Corporation then it is not the case of the plaintiff that they have been given lease by the Corporation. Under the circumstances there is no prima facie title qua lease of

the plaintiff. Apart from this aspect, Section 79 of the Bombay Provincial Municipal Corporation Act, provides as to how the movable and immovable properties of the Municipal Corporation can be disposed of. Section 79 of the BPMC Act provides that the lease for a period of 10 years of immovable property cannot be given without the sanction of the State Government. As such procedure under Section 79 of the Act is not followed, the plaintiff has no right to claim any possession of the land in question on the ground that the land belonged to the Corporation.

4.4A The learned counsel further submitted that in any view of the matter this Court may not interfere under Order 43 Rule 1(r) of the C.P.C. because the learned judge has given cogent and convincing reasons for dismissing the interim relief under order below Exh. 5 in Notice of Motion. The learned judge has properly exercised the jurisdiction and in support of the same the learned counsel has relied on the judgement of this Court in the case of ENVISION ENGINEERING VS. SACHIN INFA ENVIRO LTD. & OTHERS reported in 2002(3) GLR 2227 particularly paragraph No. 29 on page 2243.

5 Mr. S.N. Shelat, learned Advocate General with Mr. Nagarkar, learned advocate appeared on behalf of respondent Nos. 8, 9 and 10. He submitted that the application for allotment of the land was given by the plaintiff only on 9.3.2003 without any public advertisement asking for such applications from the public at large. The aforesaid application dated 9.3.2003 was taken for consideration in the meeting of the Board of Management which was held on the next day i.e. on 10.3.203 at 10.30 a.m. The meeting of the Board of the Management was presided over by the then Mayor who took up the said application by way of a special agenda without giving opportunity to other trustees.

5.1 Learned counsel has invited my attention to the resolution No. 212 dated 10.3.2003, passed by the Corporation in which the trust has decided to allot the suit land to the plaintiff. However, it has been stated that the said resolution was also envisaged that the Chairman and Superintendent have authorised to allot the land, to fix the rent and also putting the terms and conditions before giving possession of the suit premises to the plaintiff. He stated that the three trustees namely Rupaben Chinoi, Anilbhai Chinoi and V.F. Shah had objected to the said resolution.

5.1A Learned counsel has also invited my attention to

the judgement of the Apex Court in the case of H.E.H. THE NIZAM'S JEWELLERY TRUST VS. PRINCESS FATIMA FOUZIA AND OTHRS reported in AIR 1980 SC 17 particularly paragraph No. 27 on page 23 which reads thus:

"The law governing the execution of trusts is well settled. In the case of a private trust, where there are more trustees than one, all must join in the execution of the trust. The concurrence of all is in general necessary in a transaction affecting the trust property, and a majority cannot bind the trust estate. In order to bind the trust estate, the act must be the act of all. They constitute one body in the eye of law, and all must act together."

5.1B The learned counsel has relied on Full Bench of this Court in the case of ATMARAM RANCHHODBHAI VS. GULAMHUSEIN GULAM MOHIYADDIN AND ANR. reported in 13 GLR 828.

5.2 In view of the aforesaid judgements, learned counsel stated that when the resolution has not been passed by the trustees unanimously then the action of the Board is not legal and valid. If the trustees desire to allot the space in question they must jointly act in this behalf. He has further submitted that when the aforesaid resolution was passed on 10.3.2003, three trustees have opposed the said resolution. In view of the same, the said action of allotting the space to the plaintiff is illegal and to that extent the plaintiff failed to show prima facie case in his favour.

5.3 Learned counsel for the respondents have further invited my attention to paragraph 24 of the order of the learned judge particularly on page 51 in which it has been stated that it is required to be contended that resolution No. 212 granting lease in favour of the plaintiff for opening the medical store is stated to be in public interest to provide facilities to the patients or the relatives blissfully ignoring the fact that it would not have been in the public interest and interest of patients that no such space can be allowed near the Emergency Ward. Further there is already in existence the medical stores run by Apna Bazar. He further submitted that putting the said store near the Emergency Ward is not in the public interest as observed by the learned Judge and the resolution has not taken into consideration in this behalf.

5.3A The learned counsel for the plaintiff in

rejoinder stated that estoppel under Section 116 of the Evidence Act has no application. Plaintiff does not deny the title of the Board but asserts. Title in said section cannot be equated with ownership. He submitted that the Hon'ble Supreme Court in the case of H.E.H. THE NIZAM'S JEWELLERY TRUST VS. PRINCESS FATIMA FOUZIA AND OTHERS reported in AIR 1980 SC 17 case has taken a view that some of the trustees can act if trust deed so authorizes them. This question does not arise for consideration in view of facts on record. In any case trust deeds are not on record.

5.3B The learned counsel therefore submitted that the order rejecting notice of Motion is required to be set aside and interim relief of status quo and other relief prayed for are required to be granted.

MY CONCLUSION:

6.1 I have considered the facts and circumstances of the case. I have considered the judgement of the trial Court. In Webster "belong to" is explained as meaning inter alia "to be owned by, be the possession of". The precise sense which the word was meant to convey can therefore be gathered only by reading the document as a whole and adverting to the context in which it occurs (See: Judgement in Raja Mohammad Amir Ahmad Khan Vs. Municipal Board of Sitapur and Another (AIR 1965 SC 1923) particularly at para 14 on page 1929. The word "belonging" has been defined in Stroud's Judicial Dictionary at page 269 as under:

> "Property "belonging" to a person, has two general meanings (1) ownership (2) the absolute right of user."

(see: Judgement in case of Collector of Central Excise, Guntur Vs. Hindustan Shipyard Ltd., Visakhapatnam reported in 1984 (16) E.L.T. 156 (Tribunal) at page 161)

6.2 It may be noted that in view of the submission of the learned counsel for the original defendant and the judgement of the trial Court, I am of the view that the property belonged to the trust and therefore prior permission of Charity Commissioner under Section 36 of the Act has to be taken. The language of sub-section (1) of Section 36 is clear and the legislature has in no uncertain terms provided that no lease of immovable property belonging to a public trust shall be valid without the previous permission of the Charity Commissioner. Therefore, the finding of the trial court

that the transaction is void ab initio is prima facie right.

PRIMA FACIE CASE REGARDING INTERIM RELIEF:

6.3 I have considered judgements of the Supreme Court in the case of MAHENDRA AND MAHENDRA PAPER MILLS LTD. VS. MAHENDRA AND MAHENDRA LTD. (supra) and HINDUSTAN PETROLEUM CORPORATION LTD. VS. SRI SRIMAN NARAYAN AND ANOTHER (supra) which have been cited by the learned counsel on behalf of the plaintiff-appellant. In this case the plaintiff has received possession of the premises in the month of March, 2003 and in August defendant No. 1 has cancelled the resolution by which the plaintiff obtain possession of the premises. It may be noted that the said resolution was passed without obtaining permission of the Charity Commissioner and also the premises was given without any public advertisement. Therefore, the said resolution has been cancelled by defendant No. 1. In view of the same, I am prima facie of the view that the plaintiff has got right of "permissive user" of the suit premises only for short time. In view of the same, the plaintiff has no legal right which can be enforceable by the plaintiff at law. Therefore, the plaintiff has failed to establish prima facie case in his favour.

REGARDING IRREPARABLE INJURY:

6.4 As regards irreparable injury, if the plaintiff is not given injunction as prayed for, ultimately the plaintiff can always file suit for damages. If the plaintiff ultimately succeeds in the suit, the plaintiff can claim for damages in the suit against defendant No. 1 trust or against the Corporation as per the ultimate finding of the trial Court. If interim relief is not granted, the plaintiff is not likely to suffer any irreparable loss/injury or hardship as it can be compensated in terms of money.

REGARDING BALANCE OF CONVENIENCE:

6.5 As regards balance of convenience, here defendant No. 1 has given suit premises to the plaintiff for carrying on business in medicine. The whole purpose of giving suit premises on lease to the plaintiff is to facilitate the patients and their relatives who come to the hospital to buy medicine at the earliest point of time. Therefore, the convenience of the public at large is to be seen. There is already finding by the learned

trial judge that the suit premises is near the emergency ward and the same is highly inconvenient to the patients and their relatives who visited the hospital and blissfully ignoring the need of the public at large. On the other hand, if the plaintiff is not granted interim relief then the public at large is not likely to suffer any injury much less because there is already a medical store existing in the compound of V.S. Hospital and the patients and their relatives can certainly buy medicine from the said store. In view of the same, I am of the view that balance of convenience lies in favour of the defendant No. 1 trust rather than the plaintiff.

6.5A It may be noted that the plaintiff has raised the contention that the land on which the suit premises exist belongs to the Corporation whereas defendant No. 1 contended that it is a trust property. The learned trial judge has given finding on this aspect. However, as I am deciding the Appeal against the order below Notice of Motion, I have made prima facie conclusion and I am of the considered view that the question raised by the plaintiff is a disputed question of fact and law and the same can be decided after leading necessary oral and documentary evidence at the full-fledged trial. I, therefore, do not express any opinion on this question at this stage on the said issue.

7. I am of the view that the appellant had failed to make out any case for interference with the order passed by the learned trial judge refusing to grant injunction as prayed for. The order refusing interlocutory relief is neither arbitrary, capricious or perverse or in breach of the settled principles of law regulating grant or refusal of interlocutory injunction. The grant or refusal of interim injunction is a discretionary relief and the refusal to grant injunction is based upon the sound reasoning. The learned trial judge has given cogent and convincing reasons in his order refusing to grant injunction pointing out that the plaintiff has failed to make out either a prima facie case or to show balance of convenience in their favour.

8. In short, the Appeal from Order has no substance and the same is dismissed.

9. In Civil Application, as the main matter is disposed of no orders are passed on the Civil Application.

(K.M. MEHTA, J)

(pkn)

After the pronouncement of the judgement, Mr. Arun H. Mehta, learned senior counsel along with Mr. Amar Bhatt prayed that the interim relief granted by the trial court dated 23.7.2003 i.e. the date on which the suit has been filed may be continued for a period of four weeks as the appellant, original plaintiff, wants to approach the higher forum and the Supreme Court is in Christmas vacation and it will reopen only on 5.1.2004. In view of the same, the prayer made by the learned senior counsel is granted and the interim relief granted by the learned trial court will continue upto 30.1.2004.

Date: 23.12.2003 (K.M. MEHTA, J)